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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM—1960

No. 517

ALBERT L. VITTER, JR.

and

OLIVER J. COUNCE,

Petitioners,

versus

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

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To the Honorables, the Chief Justice and Associate Justices of the Supreme Court of the United States:

The petition of Albert L. Vitter, Jr., and Oliver J. Counce, with respect shows unto this Honorable Court as follows, to-wit:

1.

Citation to Official Report of Opinion Delivered in The Court Below.

The only opinion rendered by the Court below is reported in 279 Fed. (2d) 445, copy of which is to be found in the Appendix filed herewith.

2.

Grounds for the Court's Jurisdiction.

The review sought to be reviewed was rendered and entered June 20, 1960.

On July 8, 1960, petitioners were granted an extension of time within which to file an application for rehearing until July 26, 1960. Petitioners filed application for rehearing on July 26, 1960, which was denied on August 5, 1960. (Appendix.)

The jurisdiction of this Honorable Court is invoked under the Act of June 25, 1948, c. 646, 62 Stat. 928, 28 U. S. C. A. 1254 (1).

3.

Questions Presented for Review.

This is a test case wherein the Commissioner of Internal Revenue is seeking to tax and has been making assessments and collecting taxes based on an erroneous interpretation of the law.

This petition involves the following questions for determination by this Honorable Court:

(a) Where rules of a club **do not** require as a condition precedent to membership that an incoming member purchase a share of capital stock or make any payment whatever to become a holder of such stock, does the price paid on the open market to a third party constitute an "initiation fee" subject to an excise tax?

(b) Where the action of the Commissioner of Internal Revenue causes obvious and serious economic damage to innocent taxpayers of a particular class, does the Commissioner of Internal Revenue have the power to assess and collect, without advance notice, an excise tax which has not been enforced or collected for a period of thirty years?

(c) If becoming a "registered holder" of a share of the capital stock of a social club in compliance with the club's rules constitutes a transaction within the scope of the "initiation fee" excise tax law, should the tax be based upon the purchase price or the par value of the share?

The Constitutional Provisions and Statutes Involved.

"The judicial power shall extend to all cases in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; — to all cases affecting Ambassadors, other public Ministers and Consuls; — to all cases of admiralty and

maritime Jurisdiction; — to Controversies to which the United States shall be a Party; — to Controversies between Citizens of the same State claiming Lands under Grants of different States and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects."

Section 2 of Article 3 of the Constitution of the United States.

Internal Revenue Code of 1939:

"SEC. 1710. TAX.

(as amended by Sec. 543 (a) Revenue Act of 1941, c. 412, 55 Stat. 687)

(a) RATE. — There shall be levied, assessed, collected, and paid —

(1) DUES OR MEMBERSHIP FEES. — A tax equivalent to 20 per centum of any amount paid as dues or membership fees to any social, athletic, or sporting club or organization, if the dues or fees of an active resident annual member are in excess of $10 per year.

(2) INITIATION FEES. — A tax equivalent to 20 per centum of any amount paid as initiation fees to such a club or organization, if such fees amount to more than $10, or if the dues or membership fees, not including initiation fees, of an active resident annual member are in excess of $10 per year.

(b) BY WHOM PAID. — The taxes imposed by subdivision (a) shall be paid by the person paying such dues or fees, * * *.

(26 U. S. C. 1952 ed., Sec. 1710.)

SEC. 1712. DEFINITIONS.

As used in this subchapter —

(as amended by Sec. 543 (b), Revenue Act of 1941, supra)

(a) DUES. — The term 'dues' includes any assessment, irrespective of the purpose for which made, and any charges for social privileges or facilities, or for golf, tennis, polo, swimming, or other athletic or sporting privileges or facilities, for any period of more than six days; and

(b) INITIATION FEES. — The term 'initiation fees' includes any payment, contribution, or loan, required as a condition precedent to membership, whether or not any such payment, contribution or loan is evidenced by a certificate of interest or indebtedness or share of stock, and irrespective of the person or organization to whom paid, contributed, or loaned.

(26 U. S. C. 1952 ed.: Sec. 1712.)"

Internal Revenue Code of 1954:

"SEC. 4241 IMPOSITION OF TAX.

(a) RATE. — There is hereby imposed —

(1) DUES OR MEMBERSHIP FEES. — A tax equivalent to 20 percent of any amount paid as dues or membership fees to any social, athletic, or sporting club or organization, if the dues or fees of an active resident annual member are in excess of $10 per year.

(2) INITIATION FEES. — A tax equivalent to 20 per cent of any amount paid as initiation fees to such a club or organization, if such fees amount to more than $10, or if the dues or membership fees, not including initiation fees, of an active resident annual member are in excess of $10 per year.

(b) BY WHOM PAID. — The taxes imposed by this section shall be paid by the person paying such dues or fees. * * *.

(26 U. S. C. 1958 ed., Sec. 4241.)

SEC. 4242. DEFINITIONS

(a) DUES. — As used in this part the term 'dues' includes any assessment, irrespective of the purpose for which made, and any charge for social privileges or facilities, or for golf, tennis, polo, swimming, or other athletic or sporting privileges or facilities, for any period of more than six days; and

(b) INITIATION FEES. — As used in this part the term 'initiation fees' includes any payment, contribution, or loan, required as a condition precedent to membership, whether or not any such payment, contribution, or loan is evidenced by a certificate of interest or indebtedness or share of stock, and irrespective of the person or organization to whom paid, contributed, or loaned.

(26 U. S. C. 1958 ed., Sec. 4242.)

Treasury Regulations 43 (1941 ed.):

"SEC. 101.28. INITIATION FEES.—* * *

Under the Code the term 'initiation fees' includes any payment, contribution, or loan required as a condition precedent to membership, whether or not any such payment, contribution, or loan is evidenced by a certificate of interest or indebtedness or share of stock; and irrespective of the person or organization to whom paid, contributed, or loaned. It is not material whether the applicant has any hope or expectation of a return of his payment upon resignation, death, or other circumstances, nor is it material to whom he pays the money. For instance, if a golf club requires incoming members as a condition precedent to membership to purchase either from it or from retiring members a share of stock, the tax attaches to any such payment for the stock regardless of the fact that it represents a property interest in the assets of the club. Likewise, if the purchase of a share of stock in a land-holding corporation is a necessary precedent to membership in the club, the amount paid for such share of stock is taxable. In the case of a transfer of stock from a retiring member the club should collect the tax on the amount paid by the new member for the stock as well as tax on any transfer fee required from the new member.

If the initiation fee exceeds $10, the tax attaches regardless of the amount of dues or membership fees paid by an active resident annual member. If the initiation fee does not exceed $10, the tax does not apply unless the dues or membership fees, ex-

clusive of initiation fees, of an active resident annual member are more than $10 per year. If such dues or membership fees are in excess of $10 per year, any amount paid as an initiation fee is taxable whether the payment exceeds $10 or not." (Emphasis supplied.)

STATEMENT OF THE CASE.

This is a proceeding in which petitioners, Albert L. Vitter, Jr. and Oliver J. Counce, seek to recover taxes assessed and paid by them to the District Director of Internal Revenue, New Orleans, Louisiana, June 28, 1958, in the amounts of $1,140.00 and $292.13, respectively. This is admittedly a test case wherein the Commissioner of Internal Revenue is seeking to impose a tax where for many years no tax was assessed and collected. It is an extension of the scope of the law as written.

The taxes here involved were assessed under the provisions of Sec. 4241 of the Internal Revenue Code of 1954 and Sec. 1710 of the Internal Revenue Code of 1939, on the theory that the amounts paid by Vitter in 1957 and by Counce in 1954 for the purchase of shares of the capital stock of the New Orleans Country Club represented "initiation fees" as defined by Sec. 4242 (b) of the 1954 Internal Revenue Code and Sec. 1712 (b) of the Internal Revenue Code of 1939.

Petitioners filed separate actions in the United States District Court for the Eastern District of Louisiana, New Orleans Division, and, having consolidated the actions, the Court granted Respondent's motions for Summary Judgments and denied Petitioners' motions for Sum-

mary Judgments. The Court of Appeals for the Fifth Circuit affirmed the District Court.

By agreement with the Commissioner of Internal Revenue, a final judicial determination in this matter will govern the applicability of the tax in question to approximately 80 other individuals who purchased shares of stock of the New Orleans Country Club during a specified period.

The New Orleans Country Club is a social and athletic club in New Orleans, Louisiana. The Club is a Louisiana corporation chartered on December 31, 1913, with a capital stock of $150,000.00, represented by 600 shares of a par value of $250.00 each. The by-laws provide that "regular membership" shall consist of persons of legal age who are registered **holders** of at least one share of the capital stock of the Club and who are elected to membership in accordance with the charter and by-laws.

Throughout the charter and by-laws it is consistently stated that a voting or regular member shall be a **holder** of at least one share of capital stock of the corporation. Ownership of stock (as distinguished from other types of possession) is not a condition precedent of membership. A share acquired by gift, inheritance, loan or lease is validly held for membership purposes. The Club has no control over the sale of its stock which may be purchased by any person, firm or corporation without restriction. One need not be eligible or approved for membership in order to purchase stock. The capital stock of the Club is bought and sold on the open market and its value fluctuates. The Club does not derive any benefit directly or indirectly from the sale of its stock.

Although the stock of the Club is an unlisted stock, members of the New Orleans Stock Exchange are required to furnish the Exchange full information concerning sales and purchases of this stock including the date of transfer and the price. The financial page of the daily newspaper gives daily quotations of New Orleans Country Club stock in the same manner that other commercial securities are listed and quoted. It currently appears in the daily quotations under the listing of "Over the Counter" stocks. The stock is non-forfeitable and is well secured as the Club has net assets well in excess of the current value of all of its stock.

The Club does not require any payment whatsoever as a condition precedent to membership.

To meet the "registered holder" requirement in the by-laws, a share may be registered in the name of an individual although actually owned by a corporation or association or other individual. A share may be transferred as a matter of convenience from one member of a family to another. Regardless of the circumstances of acquisition or possession, the Club has no interest in the question of ownership of shares nor does it exercise any control over this. The Club looks entirely to the initiation fees and annual assessments in connection with the financial requirements of membership.

The Club does not hold any of its stock as treasury stock, and all of its capital stock has been issued. The Club receives no portion of the sale price of its capital stock when it is transferred.

A separate and distinct initiation fee is charged to each new member of the Club, regular or special, and this initiation fee is in no way related to or connected with the manner by which a member becomes a **holder** of a share of the Club's stock. There are various classes of membership where there is no requirement that such member be a **holder** of a share of stock. The only added privilege of holding a share is to entitle the holder to vote. The independent initiation fee, which is assessed uniformly to all new regular members, presently stands at $750.00 and was $300.00 at the time Petitioners Vitter and Counce became members.

The value of the stock during the period involved varied widely. On November 24, 1953, Petitioner Counce purchased a share of the capital stock of the Club at a cost of $1,425.00. This sum was paid directly to a former owner and not to the Club. On February 26, 1954, taxpayer paid directly to the Club the initiation fee of $300.00 which was in force from 1951 to July 31, 1957, as fixed by the Board of Governors, and he was elected to regular membership.

On February 1, 1957, Petitioner Vitter purchased a share of the capital stock of the Club through a local stockbroker at a cost of $5600.00. This sum was paid directly to the prior owner and not to the Club. He paid directly to the Club the initiation fee then in effect and was elected to regular membership. The present market value of the stock is approximately $2700.00.

After taxpayer Vitter purchased his share, the Commissioner of Internal Revenue announced his inten-

tion to assess and collect a 20 per cent. excise tax upon the price paid for shares of all members who had purchased stock within the four-year period immediately preceding such notification. The announcement of the Commissioner's intention had the immediate effect of decreasing the fair market value of the Club's stock.

The District Director of Internal Revenue assessed a tax of $1140 against Vitter, representing 20 per cent. of the purchase price of $5600.00. Counce was assessed the sum of $292.13, representing the purchase price of the stock in the sum of $1425.00, taxed at the same rate.

The Internal Revenue Service has not claimed or asserted any Federal excise tax or notified the Club, the public or any prospective member of the Club that any such tax was due, based upon the purchase of the Club's capital stock, since the year 1932. During the period covered by the proposed assessments, in this case a period of approximately 28½ months, Appellant Counce's tax would be $285.00, while Vitter's tax would be $1,120.00, or four times more than the tax paid by Counce for an identical membership.

ARGUMENT OF REASONS RELIED UPON FOR THE ALLOWANCE OF THIS WRIT OF CERTIORARI.

A.

This Case Involves a Serious National Issue and Should Be Reviewed.

This is a test case of a novel issue not heretofore passed upon by this Court.

The decision below has direct effect and application to all social and athletic clubs throughout the country whose shares are purchased on the open market. The general economic prosperity has prompted the establishment of many new clubs over the past few years, and the question of whether the 20 per cent. excise tax on initiations extends to the total dollar amount of their traded shares is of prime importance to all such clubs and their members as well as the Federal Government. This case has direct application to thousands of individuals.

The dissent to the majority decision of the Circuit Court evidences the seriousness of the legal questions involved.

B.

The Circuit Court Erred in Its Interpretation of the Statutory Definition of "Initiation Fees" by Ignoring the Mandate That a Payment, to Come Within the Definition, Must be Required by the Club.

The most basic and fundamental question presented to the Circuit Court has not been considered in the opinion.

The definition of "initiation fees," Section 4242 (b) of the Code provides:

> "As used in this part, the term 'initiation fees' includes any payment, contribution or loan required as a condition precedent to membership . . ."

Under this provision, the sole question is whether the purchase price of taxpayers' stock was a "payment . . . required as a condition precedent to membership . . ."

The by-laws of the Club provide:

> "Regular membership shall consist of persons of legal age, who are registered holders of at least one share of the capital stock of the Club . . ."

For taxation to occur the payment involved must be required **by the Club**, through its charter, by-laws or other appropriate rule. The tax does not apply to all sums which an incoming member might spend in order for him to satisfy a condition precedent to membership. The test is "What payment does the Club require?" and not "How much has a new member paid out to satisfy a condition precedent to membership?"

The New Orleans Country Club charter and by-laws did not **require** that the taxpayer spend a nickel to become a holder of the share. Accordingly, it is immaterial whether the taxpayer became a holder in a manner which caused no expenditure or whether he became a holder by purchasing a share.

It is admitted by the government and acknowledged by the Circuit Court that a new member can become a holder of a share by "gift, devise and inheritance" (Tr. p. 48) and possibly by "borrowing, leasing or begging" (Tr. p. 49) a share. The charter and by-laws of the New Orleans Country Club do not require that a new member pay any price whatever to become a holder of a share. How can it be said, then, that the rules of the Club require a payment, or that a payment is **required** as a condition precedent to membership? It is a fact that taxpayers here purchased their shares in order to become holders thereof. However, this is not the test.

The Circuit Court, after considering the pertinent sections of the Internal Revenue Code, reconstructs their meaning as follows:

> "There is imposed a 20% tax on any amount paid, contributed or loaned as a condition precedent to membership in a club irrespective of the person or organization to whom such payment, contribution, or loan is made and whether that which is received for such payment, contribution or loan is evidenced by a certificate of interest or indebtedness or shares of stock." (Tr. p. 50.)

The fundamental error with this interpretation of the law is the omission of the most important word "required." Under this test, **any sum** expended by an incoming member would be subject to the tax. However, the law specifically states that the tax only applies to amounts **required to be paid** by the Club.

The test used by the Circuit Court in its opinion, that is, that of looking to each individual member and taxing or not taxing depending upon the manner each became a "holder," is obviously improper when considered in light of the Club's requirements for other types of membership. For example, one of the requirements for eligibility to "Senior Membership" is that the member must have been a Regular Member of the Club thirty years or more. It is evident that quite a large sum of money would have been spent by a Regular Member over a period of thirty years to retain his Regular Membership. Under the interpretation of the law as set forth in the opinion, a tax could be levied against the new Senior Member of 20 per cent. of all dues expended by

him in maintaining his Regular Membership over the past 30 years, since Regular Membership for that period is a condition precedent to Senior Membership. However, it is submitted that the tax would not apply to such sums since the statute instructs us to look to the payment actually required by the Club as a condition precedent to membership and not to look to the amounts spent by a member to satisfy a condition precedent where no payment is actually required.

Neither does the Club sell the stock as a part of its membership program, nor is there any requirement of acquiring such a share from a retiring member.

It is further submitted that the Circuit Court committed the same error by stating:

> "... if the payment was **actually essential** to becoming eligible for membership in a Club, that payment, by whatever form, was both the taxable event and a determination of its amount." (Tr. p. 50.) (Emphasis added.)

The error here is that the Court has concluded taxability by the circumstances of the individual members and has overlooked the prime question of whether **the Club required** payment as a condition precedent.

Had the New Orleans Country Club's rules required the **purchase** of a share, taxation would automatically follow with the amount dependent upon the sum expended. Also, taxation would be automatic under the actual New Orleans Country Club rules if the only manner in which an applicant for membership could become

a "holder" was by purchase. However, it is acknowledged by the Circuit Court that a member can become a "holder" by gift, devise, inheritance, borrow, beg or lease. Under these circumstances, it is evident that the Club does not require that payment be made. Therefore, there can be no tax.

The House and Senate Reports of the 70th Congress, 1st Session, show clearly that the reason for the 1928 amendment, which added the definition of "Initiation Fees," was that CLUBS were permitting members to avoid the tax by eliminating the historic initiation fee and, in lieu thereof, requiring the new members to purchase stocks or bonds; that is, the CLUBS, by their rules, required a purchase.

House Report on Public Bills, 70th Congress, 1st Session, No. 1, p. 26:

> "Club Dues Tax. — It has been found that the tax on dues is being evaded by the device of lowering the amount of dues and collecting the money by assessments and that the tax on initiations is being evaded by **requiring** the **purchase** of a share of stock or bond. It is provided in Section 412 that the term 'dues' includes any assessment irrespective of the purpose for which it is made. For similar reasons it is provided that the term 'initiation fees' includes any payment, contribution or loan required as a condition precedent to membership, whether or not evidenced by a contribution or share and regardless of the person or organization to whom it is paid, contributed or loaned, . . ." (Emphasis added.)

Senate Report on Public Bills, 70th Congress, 1st Session, p. 34:

> "The house bill amends the existing law to take care of a situation which has arisen from the prevalent use of the device of lowering the amount of club dues and collecting the required money by assessments instead as a means of evading the club dues tax. There is a similar situation with respect to the tax on initiations which is being avoided by **requiring the purchase** of a share of stock or a bond instead of the direct payment of an initiation fee." (Emphasis added.)

Thus, it is clearly evident that the 1928 amendment was intended to tax any payment required **by the Club** rules. If a payment was required by the Club, and the payment was made by the member, then the amount of the payment was taxable. Neither House and Senate Reports, nor the law as enacted, intended to tax any payment made by some incoming members and not by others where the Club rules do not **require a payment.**

C.

This Issue of Law Has Never Been, But Should Be, Settled by This Court; the Cases Relied Upon by Respondent Have No Application.

This Court has never rendered an opinion clarifying the definition of "initiation fees." There is an apparent conflict between Sec. 4241 (a) (2) of the Internal Revenue Code of 1954, which provides that the taxable "initiation fee" must be **paid to the Club**, and Sec. 4242 (b) of the Code which indicates that the tax is applicable

whether or not payment is made to the Club. Petitioners here did not pay the purchase price of their stock, or any portion thereof, to the Club, but made payment in full to third parties.

The Court of Appeals for the Fifth Circuit has construed "initiation fees" to mean any payment which is "actually essential" to becoming eligible for membership, yet the statute taxes only payments **required** by the Club. Thus, the Circuit Court has substantially deviated from the statutory definition.

The cases relied upon by Respondent, *Mann v. Bowers*, 47 F. (2d) 304; *Wild Wing Lodge v. Blacklidge*, 59 F. (2d) 421; *Knollwood Club v. U. S.*, 48 F. (2d) 971, have no application to the facts of the instant matter.

In each there was no separate, independent and substantial initiation fee. In each the purchaser of stock paid the same price which the Club had obtained upon original issue. In *Wild Wing Lodge* the Club had a first option to repurchase the shares before sale to outsiders. In each the requirement was that the new member be vested with **ownership** of the stock.

In the instant matter the New Orleans Country Club stock was originally issued in 1913 by the Club at $250.00 per share and ever since has been continually traded on the open market at fluctuating values. A separate, independent and substantial initiation fee has always been charged new members irrespective of the manner by which they became holders of shares. The Club has absolutely no control over the disposition of its stock.

D.

The Court of Appeals Erred by Failing to Recognize the Inequities of a Retroactive Assessment After Respondent Had Failed to Assert the Tax in Question for Thirty Years Prior Thereto.

The Government has failed to assert or collect an excise tax on shares of New Orleans Country Club stock for approximately 30 years prior to these assessments. By now claiming the tax retroactively on shares purchased within the past four years, Respondent has used as a basis for its assessment a much higher stock value than that which would have been present had such tax been known to apply and asserted at the time of Petitioners' purchases. The assertion of the tax in question had the immediate effect of reducing the market value of the stock by an amount at least equal to the tax claimed. Thus, for example, Vitter, who paid $5600.00 for his share, was assessed a tax of $1140.00. Immediately thereafter the value of his stock dropped to $4500.00, after having paid a total of $6,740.00. Had the tax been in effect at the time of Vitter's purchase the sale price would have been substantially lower than $5,600.00. It is submitted that this Petitioner should not be made to suffer financially as a direct result of Respondent's tax collection policy change. The Government should not be allowed to unjustly enrich itself at a taxpayer's expense.

To further aggravate the situation, as this tax demand became common knowledge among the general public, the market value of New Orleans Country Club stock continued to decline. Before the change in taxing

policy a purchaser of the Club's stock would obtain all of his money back upon a subsequent sale, assuming a steady market. However, after the change in taxing policy, a purchaser knew, assuming the same steady market, that he would immediately lose 20 per cent. of the purchase price, *i. e.*, the tax. Thus, it is obvious that the taxing policy change has had a disastrous economic effect not only to Petitioners, but also to approximately 100 other stockholders who acquired their shares during the four-year period in question. The decision of the Circuit Court affects the taxability of all shares purchased during this period, aggregating approximately $80,000 in taxes, and has a material effect on the market value of all 600 outstanding shares.

In sustaining the constitutionality of the taxing provision in question, *Manor v. Bowers*, supra, states:

> "The tax imposed by this statute is an excise on the privilege of joining a club of a designated character; the measure being 10 per cent. of the amount paid as initiation fees. To impose the tax, the member must exercise the privilege of joining the club. The tax falls upon him for such privilege, and he may escape it by not joining."

Petitioners had no such decision to make. No tax was urged and none was collected. There was no opportunity to "escape" the tax. It was only after the purchases had been made that Respondent changed its long-standing policy and **retroactively** asserted the tax on all members who purchased their shares within the previous four-year period.

The stock has a present value of approximately $2,700.00 per share. It is safe to assume that Respondent's change in taxing policy would have had the effect of bringing the value down to at least $4,000 per share, thereby allowing the balance of the decrease to other factors. The decrease attributable to the taxing policy would then amount to $1,600.00 per share, or a total decrease of $960,000.00 in the fair market value of all 600 shares.

The erroneous decision of the Court of Appeals will cause a proportionate loss to every taxpayer of this class throughout the country. Thousands of persons will be affected and many millions of dollars of damage will result.

E.

Alternatively, Any Excise Tax Should Be Limited to the Par Value of the Shares (Original Issue Price) and Not the Purchase Price Thereof.

Appellants' position is firm that the excise tax was improperly assessed in that the statutes were never intended to apply to the facts and circumstances before the Court.

However, should it be determined that the tax does apply, it then becomes important to determine the amount on which the 20 per cent. tax applies.

It is submitted that the Circuit Court improperly based the tax on the purchase prices of the individual shares. Appellant Vitter's amount is four times that of Appellant Counce, yet they share exactly the same membership privileges. Others who inherit, rent or are

give.. shares also enjoy identical privileges yet pay no tax. The membership involved in the *Munn*, *Wild Wing* and *Knollwood* cases, *supra*, were sold at either a constant value or at original issue price.

Assuming taxability solely for the purpose of argument under this point, the *Munn* and *Knollwood* cases, *supra*, held the tax applicable to the face value or original issue price of the share or certificate. Accordingly, in the instant matter the tax should necessarily be based upon the $250.00 par value of the New Orleans Country Club stock.

In *Knollwood*, *supra*, at page 972, the Court reasons:

> "The plaintiff contends that, inasmuch as the purchase price for transferred certificates of membership was paid to the vendee and not the club, the transaction may not be construed, under the applicable sections of the Revenue Act, as the payment of initiation fees. This, it seems to us, ignores the fact that the adopted course of procedure to gain admission into the club exacted as an original proposition the payment into the club of the full issue price of certificates of membership. True, the club recognized the right of transfer, but the transferee did no more, insofar as facts alleged in the petition are involved, than substitute himself in the place of the previous owner . . ."

This reasoning is applicable to the New Orleans Country Club stock since Appellants "substituted" themselves in the place of the initial owners of their shares, the original subscribers, who paid the "full issue price"

of $250.00, which amount the Club "exacted as an original proposition." The tax, if at all applicable, should be restricted to this original issue price, which then and now stands at a par value of $250.00. It is the only portion of Appellants' stock purchase price which can be considered as "paid . . . to such club or organization" under Sections 4241 (a) (2) and 1710 (a) (2) of the Internal Revenue Codes of 1954 and 1939.

Wherefore, Petitioners respectfully pray that this petition be granted and that a writ of certiorari issue, directed to the United States Court of Appeals for the Fifth Circuit, commanding that Court to certify and send to this Honorable Court, for its review and determination, a full and complete transcript and record of all proceedings in the cause entitled *Albert L. Vitter, Jr., and Olive J. Counce v. United States of America*, bearing Number 18,244, on the Docket of the Court of Appeals for the Fifth Circuit, to the end that the judgment and opinion of said Court of Appeals may be reversed by this Honorable Court granting Petitioners' motion for Summary Judgment.

Petitioners further pray for such other and further relief in the premises as may seem proper and just.

GEORGE R. BLUE,
232 California Company Bldg.,
New Orleans 12, Louisiana.

CERTIFICATE.

I, the undersigned, of counsel for Petitioners, hereby certify that I have served a copy of the [illegible] petition upon the Solicitor General, Department of Justice, Washington 25, D. C., by depositing the same in the United States mails, addressed as aforesaid, with air-mail postage prepaid and also upon M. Hepburn Many, United States Attorney, by mailing a copy thereof to him, with first-class postage prepaid, addressed to him at his office in the Federal Building, New Orleans, Louisiana, said mailings accomplished this 1st day of November, 1960.

Attorney for Petitioners.

APPENDIX.

ORDER

It is hereby ordered that the motions for summary judgment filed in behalf of each of the parties hereto be submitted to the court for determination without further argument.

It is further ordered that the hearing on plaintiffs' motion for summary judgment scheduled for Wednesday, October 28, 1959 be cancelled.

New Orleans, Louisiana, this 28th day of October.

s Herbert W. Christenberry

JUDGE

ORDER GRANTING MOTIONS OF DEFENDANTS FOR SUMMARY JUDGMENT AND ORDER DENYING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

MINUTE ENTRY December 31, 1959

Judge Christenberry

(Numbers and Titles Omitted.)

The above-entitled and numbered cases came on for hearing on the motions of defendant for summary judgment, as well as on the motions of plaintiff for summary judgment, and were argued by counsel for the respective parties and submitted when the court took time to consider.

Now, after due consideration thereof;

IT IS ORDERED by the court that the motions of defendant, for summary judgment, are [illegible] GRANTED, except to the extent that the imposition of the excise tax on initiation fees included tax on the broker's commission paid on the acquisition of the share of stock.

IT IS FURTHER ORDERED by the court that the motions of plaintiffs, for summary judgment, be, and the same are hereby DENIED, except to the extent that the imposition of the excise tax on initiation fees included tax on the broker's commission paid on the acquisition of the share of stock.

Beard, Blue and Schmitt (George R. Blue)
Lloyd Cyril Melancon, Asst. U. S. Attorney
H. W. C.

JUDGMENT.

Extract from the Minutes of June 20, 1960.

ALBERT E. VITTER, JR., and OLIVER J. COUNCE,

No. 18211. versus

UNITED STATES OF AMERICA.

This cause came on to be heard on the transcript of the record from the United States District Court for the Eastern District of Louisiana, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

"Cameron, Circuit Judge, dissenting."

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No 18241

ALBERT J VITTER JR and OLIVER J COUNCE
Appellants

versus

UNITED STATES OF AMERICA
Appellee

Appeal from the United States District Court for the Eastern District of Louisiana

(June 20, 1960)

Before RIVES, Chief Judge, and CAMERON and BROWN, Circuit Judges

BROWN, Circuit Judge: The problem dealt with here is liability for the excise tax on payment of initia-

The 1954 Code, 26 USCA §§4241-4242, applicable to one case, and substantially identical to the 1939 Code, 26 USCA §§1710-1712 (1952 Ed.), applicable to the other, provides:

SEC. 4241. IMPOSITION OF TAX.

(a) Rate. There is hereby imposed

(1) Dues or membership fees. A tax equivalent to 20 per cent of any amount paid as dues or membership fees to

tion fees as a condition precedent to becoming a member of the New Orleans Country Club. There are no disputed issues of fact, and summary judgment, all agree, was a proper method of disposition of the Taxpayers'[3] refund suit. The controversy is confined to whether the District Court's decision against the Taxpayers and in favor of the Government was correct.

any social, athletic, or sporting club or organization, if the dues or fees of an active resident annual member are in excess of $10 per year.

"(2) Initiation fees.—A tax equivalent to 20 per cent of any amount paid as initiation fees to such a club or organization, if such fees amount to more than $10, or if the dues or membership fees, not including initiation fees, of an active resident annual member are in excess of $10 per year.

"(b) By Whom Paid. * * * the taxes imposed by this section shall be paid by the person paying such dues or fees, * * *." 26 USCA §4241 (1959 Supp.)

"SEC. 4242. DEFINITIONS.

"(a) Dues.—As used in this part the term 'dues' includes any assessment, irrespective of the purpose for which made, and any charges for social privileges or facilities, or for golf, tennis, polo, swimming, or other athletic or sporting privileges or facilities, for any period of more than six days; and

"(b) Initiation Fees.—As used in this part the term 'initiation fees' includes any payment, contribution, or loan required as a condition precedent to membership, whether or not any such payment, contribution, or loan is evidenced by a certificate of interest or indebtedness or share of stock, and irrespective of the person or organization to whom paid, contributed, or loaned." 26 USCA §4242 (1955 ed.)

[3] These are two separate suits consolidated for trial and appeal brought as test cases and stipulated to control the outcome of 80 other cases. We refer indiscriminantly to one or both plaintiffs as Taxpayer.

Counce: Purchased stock November 24, 1953, paying $1,425 plus brokerage, also paid initiation fee direct to Club, elected and admitted to regular membership February 26, 1954.

Vitter: Purchased stock February 4, 1957, paying $5,600 plus brokerage; also paid initiation fee direct to Club, elected and admitted to regular membership February 7, 1957.

Not the first dues-paying-taxpaying country-club member dissatisfied with such a handicap, Taxpayer appeals on three main grounds. First, there was no [illegible] ment to or for the benefit of the Club so no taxable event ever occurred. Second, to invoke this application of the statute at this late date beginning in 1958 is grossly unfair. And third, if anything is due, it should be limited to the par value of the stock ($250) not the fluctuating market prices actually paid (see note 2, *supra*).

For an organization whose aims reflect considerable ambitious hopes in the nonprofessional fields of athletic, intellectual, cultural and aesthetic attainments,

The charter provides:

> "The objects and purposes for which this corporation is established are declared to be
>
> "To promote and foster, and afford opportunity for, athletic and other like exercises, and such sports as Golf, Lawn Tennis, Polo, Baseball, Football, Bowling, Boating, Swimming, Sailing, Driving, Horse back riding, Automobiling, Canoeing, Gun-practice, Rowing, Hunting, Fishing, Fencing, Gymnastics, and all other in-door and out-door social and athletic games and sports; to regulate social intercourse and amusement among its members, to promote among them refinement of manners and intellectual improvement by the establishment and maintenance of a club-house with provisions for out-door and in-door games and sports by an accumulation of well-assorted and standard books and periodicals, and to these ends, to buy, sell, erect, hold, lease, or otherwise acquire, and to convey or otherwise alienate and dispose of, and to maintain and operate one or more club-houses and appurtenances, including grounds, out-houses, golf links, tennis courts, boat houses, garages, hangars, wharves, stables, hitching sheds, cafes and refreshment rooms, polo field, bowling alleys, athletic grounds, shooting ranges, gymnasium, natatorium, and all other necessary paraphernalia and equipment incidental to the carrying on of the sports above enumerated, and kindred out door and indoor sports and games."

New Orleans Country Club has at least one unique aspect. Stock in the Club, indispensable to regular membership, is regularly traded in as a security in the over-the-counter stock market of New Orleans. There, as in the case of stock of local banks and other business enterprises not listed on a national exchange, the price rises and falls as "Bid" and "Asked" make the current market.

Therein lies the nub of the green. For this in turn seems to stem from the unusual fact that under the Club's charter it is not necessary that a regular member own a share of stock—he need only be the holder of it. Stock may therefore be owned by a non-member. And a member may be a non-stockholder. This gives the stock a speculative marketability in terms of possible appreciation in value unrestricted, as in the case of most lodges or clubs, to a select or approved group of persons as potential buyers. It is entirely possible then that one could buy a share of NOCC stock with no intention of ever being a member, or for that matter, with the certainty that from personality traits, business associations, past personal moral record, or similar considerations, the purchaser could never become a member.[4]

But such is not our case. Taxpayer, in his desire to become a regular member purchased a share of stock in order to qualify himself as an applicant and obtain election to membership. To do so, Taxpayer bought the

[4] Included within such category and without any moral aspersions would be corporate purchasers who, as inanimates, could never ride a horse, sink a putt, return a volley, read a well-assorted book, or enjoy the other facets of membership described in note 3, supra.

stock in the open market as its market value. Note 2, *supra*.

While this unique marketability does reflect an economic value giving the stock some attributes of a commercial investment, the charter makes clear that except for its potential appreciation for sale to one desiring membership, it has no real worth apart from enjoyment of the Club's facilities by a member holding it. The stock is subject "to pro rata assessment at the direction of the Board of Governors for the purpose of paying the necessary initial and running expenses of the Club * * *." And "on failure of any stockholder to pay any assessment levied by the Board of Governors * * * on the share or shares held by him * * *," such stock is subject to sale with the proceeds thereof to "be applied to the payment of all unpaid assessments due by said share of stock * * *." Even more critical, this lien with right of sale expressly covers "other indebtedness due to the Club by the member in whose name [the stock] stands * * *." And while, as indicated above, the stock is traded in on the open market, the sale might not be effective since no share of stock can be transferred "until all past due and unpaid assessments, and other indebtedness, are paid in full."

Thus the stockholder has, for a corporate investment, an "asset" of continuing liability, not the usual non-liability. From an economic point of view, the charter's own language plainly sets forth that the "only right to be enjoyed by a shareholder who is not also a member shall be the right * * * to receive his pro rata share of the assets" in the event of dissolution of the corporation.

Even in this he has limited rights because, as a non-member-stockholder, he cannot vote on any matter concerning either current operations or dissolution. What stock ownership lacks in an economic sense is even more glaringly absent concerning non-financial, personal enjoyment. The charter expressly provides that "ownership of one or more shares of the capital stock of this corporation shall not confer upon the holder any of the rights or privileges of membership." Nor, except from a vantage point off the premises could he even look at or examine the properties an aliquot portion of which he might sometime receive in distribution if others so voted. The broad denial of membership privileges is explicitly spelled out. Stock ownership shall not "include the right to vote on any question or to use or go upon the property or assets of the organization, unless, in addition, the said holder shall have been duly elected a member of this organization in the manner" prescribed.

On the other hand, while the stock has slight economic benefits and none for enjoyment, it is indispensable to membership. The charter-authorized By-Laws prescribe that a regular member must be the holder of a share of stock.[2] Neither the charter nor the by-laws prescribe how the stock should be obtained, and it is uncontradicted that such stock is frequently transferred by gift, devise or inheritance. A regular member in addition to being the holder of a share of stock is at the time of

[2] "2 The several classes of membership in the Club shall be as follows:

"A. REGULAR MEMBERSHIP—Shall consist of persons of legal age, who are registered holders of at least one share of the capital stock of the Club"

his election also required to pay directly to the Club a sum fixed and described as an initiation fee.

The one thing in this case as obvious as a water hazard is that for Taxpayer to achieve the status of a regular member of NOCC, he had to hold a share of stock. He did not own one. Presumably he could not borrow, lease or beg one. In any event he held the stock by buying it. In a real sense, then, this, in the words of the statute was "required as a condition precedent to membership." 22 USCA §4242(b), note 1, supra

Taxpayer does not really dispute this, nor could he. But, he insists, such candid realism neither produces a stymie nor puts him irretrievably in a bunker. This is so, he contends, because there is a conflict between §4241 and §4242, note 1, supra. He reasons it this way. The tax prescribed in §4241 is imposed on a percentage of "any amount paid as initiation fees to * * * a club." Here there was no payment to the Club. The payment was to the former stock owner. On the other hand, §4242(b) undertakes to impose the tax "irrespective of the person or organization to whom such initiation fee is paid, contributed, or loaned." The conclusion is then asserted that since the tax imposing provision prescribes one recipient and the next section in general terms another, there is a conflict requiring construction favorable to the precise provision and, incidentally, to the Taxpayer.

But this is an artificial cutting up of a single statute into several unrelated parts, not a reading of it together as a whole. The second part, §4242, is not separate. Indeed, its topic head as "Definitions" shows a

ongressional purpose to read all stated in §4242 as though it were physically written into §4241. As reconstructed its meaning is substantially this. "There is imposed a 20% tax on any amount paid, contributed or loaned as a condition precedent to membership in a club irrespective of the person or organization to whom such payment, contribution or loan is made and whether that which is received for such payment, contribution or loan is evidenced by a certificate of interest or indebtedness or share of stock.

In the amendments[5] which eventuated in the statute, note 1, Congress was intending to plug not only demonstrated loopholes,[6] but to make certain that whatever device was followed, if the payment was actually essential to becoming eligible for membership in a club, that payment, by whatever form, was both the taxable event and a determination of its amount.

Payments made to the former owner of stock to comply with the club's requirement that a member be a stockholder have uniformly been held to be within the broad definition of "initiation fees." Mann v. Bowers, 2 Cir., 1931, 47 F.2d 204; Knollwood Club v. United States, Ct.Cl., 1931, 48 F.2d 971; Wild Wing Lodge v. Blackledge, 7 Cir., 1932, 59 F.2d 421. In none was the pay-

[5] This is traced in Mann v. Bowers, 2 Cir., 1931, 47 F.2d 204, 205, cert. denied, 283 U.S. 845, 51 S.Ct. 492, 75 L.Ed. 1454.

[6] Typical of these the Taxpayer points to Lukens v. United States, 1926, 62 Ct.Cl. 598; Alliance Country Club v. United States, 1926, 62 Ct.Cl. 579; Page v. United States, 1926, 62 Ct.Cl. 592; Masonic Country Club v. Holden, 6 Cir., 1927, 18 F.2d 553. See also Senate Rpt. on Public Bills, 70th Cong. 1st Sess., p. 34.

ment either to or for the benefit of the club. This approach is reflected by the regulations which, unchanged after many years, have received the implied congressional imprimatur from continued acquiescence.[1]

Having progressed this far on the course, the other two objections take little treatment. The complaint is that since the tax was not asserted against persons acquiring stock of NOCC from 1930 through 1953 (when the Collector commenced his assessments), it is unfair.

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[1] The applicable regulation carries forward without changes of wording the regulation initially adopted. See Knollwood Club v United States, Ct Cl., 1931, 48 F 2d 971 at 972.

"It is not material whether the applicant has any hope or expectation of a return of his payment upon resignation, death, or other circumstances, nor is it material to whom he pays the money. For instance, if a golf club requires incoming members as a condition precedent to membership to purchase either from it or from retiring members a share of stock, the tax attaches to any such payment for the stock regardless of the fact that it represents a property interest in the assets of the club. Likewise, if the purchase of a share of stock in a landholding corporation is a necessary precedent to membership in the club, the amount paid for such share of stock is taxable. * * *" Treasury Reg. 43 (1941) §101.28.

When a Treasury Regulation interprets a section of the Code and the Regulation remains in effect and unchanged for a long period of time, re-enactment of the statute without change is presumed to show congressional approval of the Regulation which thereby acquires the force and effect of law. Commissioner v. Flowers, 1946, 326 U.S. 465, 469, 66 S.Ct. 250, 90 L.Ed. 203, 207; Boehm v. Commissioner, 1945, 326 U.S. 287, 291-292, 66 S.Ct. 120, 90 L.Ed. 78; Helvering v. Reynolds Co., 1939, 306 U.S. 110, 114-115, 59 S.Ct. 423, 83 L.Ed. 536, 540-541; White v. United States, 1938, 305 U.S. 281, 291, 59 S.Ct. 179, 83 L.Ed. 172, 178-179; Helvering v. Wimmill, 1938, 305 U.S. 79, 83, 59 S.Ct. 45, 83 L.Ed. 52, 55; Cammarano v. United States, 1959, 358 U.S. 498, 510, 79 S.Ct. 524, 3 L.Ed.2d 462, 470; Jones' Estate v. Commissioner, 5 Cir., 1942, 127 F.2d 231, 232; Commissioner v. West Production Co., 5 Cir., 1941, 121 F.2d 9, 12; cf. Estate of Woodward v. Commissioner, 24 T.C. 883, 896, affirmed, sub. nom. Barnhill v. Commissioner, 5 Cir., 1957, 241 F.2d 496, 499.

Apparently this is so for two reasons. First, when the heavy hand of the Tax Collector fell, it depressed the resale market value in substantially like amounts. Second, the newer members have had to incur additional costs which earlier members escaped. But whatever the reason, it cannot prevail here with us. Ours is a narrow function to interpret, not make, the law. If suffering this economic penalty of loss of stroke and distance from this inequitable unplayable lie is too severe, relief may not come from the umpire. The rules have first to be changed, and Congress may alone do that.

The remaining argument that the tax should be computed on the par value ($250) simply ignores the nature of the tax. It is not on the acquisition of the stock or the value of the stock. It is an excise tax on the payment required to obtain the stock as a qualification for membership. What is paid, not what is obtained, is the measure of the tax.

AFFIRMED

CAMERON, Circuit Judge; I Dissent.

A true copy

Test:

EDWARD W. WADSWORTH
Clerk, U. S. Court of Appeals, Fifth Circuit
New Orleans, Louisiana
Oct. 28, 1960

ORDER

IT IS ORDERED that Appellants be granted an extension of time until July 26, 1960, within which to file

a petition for rehearing in the above entitled and numbered cause.

s John R. Brown

U. S. CIRCUIT JUDGE

July 8, 1960

(ORIGINAL FILED JULY 8, 1960)

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 18,244

ALBERT L. VITTER, JR., and OLIVER J. COUNCE,
Appellants,

versus

UNITED STATES OF AMERICA,
Appellee.

Appeal from the United States District Court for the Eastern District of Louisiana

August 5, 1960

ON PETITION FOR REHEARING

Before RIVES, Chief Judge, and CAMERON and BROWN, Circuit Judges.

PER CURIAM:

It is ORDERED that the petition for rehearing filed in the above entitled and numbered cause be, and the same is hereby DENIED.

"Cameron, Circuit Judge, Dissenting."